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Representing the United States of America

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,
Plaintiff,
vs.
OMAR QAZI,
Defendant.

Case No.: 2:15-cr-00014-APG-VCF

**GOVERNMENT'S MOTION IN
LIMINE TO PRECLUDE ANY
ARGUMENT OR EVIDENCE
REGARDING (1) PROSECUTORIAL
CHARGING DECISIONS; OR (2)
PRETRIAL LITIGATION**

CERTIFICATION: The undersigned counsel certifies that this Motion is timely filed.

The United State of America, by and through DAYLE ELIESON, United States Attorney, and ALEXANDRA MICHAEL and PATRICK BURNS, Assistant United States Attorneys, hereby respectfully submit this Government's Motion In Limine to Preclude Any Argument or Evidence Regarding (1) Prosecutorial Charging Decisions; and (2) Pretrial Litigation.

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POINTS AND AUTHORITIES

I. Introduction

Defendant Omar Qazi (Qazi) is charged in a one-count indictment with being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Qazi's DNA was found on the subject firearm and he gave a recorded confession admitting his guilt. Based on his filings, letters, and in-court statements, the Government anticipates that Qazi will attempt to introduce at trial argument and/or evidence relating to: (1) the Government's decision to exercise its prosecutorial discretion to indict him;¹ and (2) pretrial litigation that has taken place regarding discovery, motion practice, and other issues.² Because neither of those topics are relevant to the jury's determination at trial and would otherwise be used by Qazi for improper purposes, such as distracting the jury, wasting time, and encouraging nullification, the Government moves for an order in limine precluding Qazi from introducing such arguments and/or evidence at trial.

II. Legal Argument

A. The Court Should Preclude Any Evidence or Argument Related to the Government's Exercise of its Prosecutorial Discretion to Charge Qazi

The Government anticipates that Qazi may seek to introduce evidence related to prosecutorial decisions made by the United States Attorney's Office for the District of Nevada and also by the State of Nevada. This evidence may be related to such things as

¹ See, e.g., ECF No. 99 at 7-15 (Qazi's motion to dismiss claiming that state prosecution deprives Government of power to indict him federally); 221 at 2:20-4:17 (Qazi brief arguing that his case "is a state case" and Government has no jurisdiction to prosecute him).

² Among other things, Qazi intends to introduce into evidence the hearsay transcript of his suppression hearing, and he has stated in a jail call posted to YouTube that he intends to make an issue of his pretrial detention pending trial.

1 the decision to file federal charges against Qazi, the State of Nevada's decision to dismiss
 2 state charges, and similar topics. The Government believes that Qazi use such
 3 argument/evidence to mount some sort of defense that he was already charged for this
 4 conduct but the case was dismissed – hence, the jury should not convict him in this case.
 5 He also may attempt to encourage the jury to nullify the law by arguing that he should
 6 be acquitted because the case would have stayed in state court absent “federal
 7 overreach.” These types of arguments and evidence should be excluded from trial.

8 Prosecuting attorneys have broad discretion in handling criminal matters. Thus,
 9 if a prosecutor believes there is probable cause that a crime has been committed, “the
 10 decision whether or not to prosecute, and what charge to file or bring before a grand jury,
 11 generally rests entirely in his discretion.” *Wayte v. United States*, 470 U.S. 598, 607-08
 12 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). “This broad discretion
 13 rests largely on the recognition that the decision to prosecute is particularly ill-suited to
 14 judicial review. Such factors as the strength of the case, the prosecution’s general
 15 deterrence value, the Government’s enforcement priorities, and the case’s relationship
 16 to the Government’s overall enforcement plan are not readily susceptible to the kind of
 17 analysis the courts are competent to undertake.” *United States v. JDT*, 762 F.3d 984,
 18 996 (9th Cir. 2014) (citing *Wayte*, 470 U.S. at 607).

19 In addition, evidence bearing on the government’s decision to prosecute is
 20 “extraneous and collateral” and thus should be excluded from trial. *See United States v.*
 21 *Johnson*, 605 F.2d 1025, 1030 (7th Cir. 1979) (affirming the exclusion of evidence offered
 22 to show that the “indictment was a political instrument”); *United States v. Berrigan*, 482
 23 F.2d 171, 174-76 (3d Cir. 1973) (affirming exclusion of evidence relating to

1 “discriminatory prosecution”). It is settled law that inquiries regarding the subjective
2 intentions or motivations of a government agent are irrelevant to determining the
3 factual guilt or innocence of a defendant. *See, e.g., United States v. Goulding*, 26 F.3d
4 656, 667 (7th Cir. 1994) (noting, even in the context of an entrapment defense, it was
5 proper for the trial court not to “allow the defense to mount an inquiry into the mental
6 states of the investigating officers since such an inquiry was irrelevant”). For these same
7 reasons, a jury should not be permitted to consider evidence or testimony related to
8 matters of prosecutorial discretion.

9 Accordingly, the jury should not be allowed to review documents or evidence, or
10 hear argument, concerning the Government’s decision to charge Qazi, what charges it
11 selected, or whether Qazi was charged for conduct arising from the facts or
12 circumstances of a case in another jurisdiction, or why the State of Nevada chose to
13 dismiss state charges. These decisions are purely within the discretion of the
14 prosecution. Whether to charge or not charge a particular target, what charges to bring
15 before the grand jury, and whether to proceed with new or different charges is not
16 relevant to whether Qazi committed the crimes alleged in the indictment. Put simply,
17 these discretionary decisions have absolutely no bearing on any fact of consequence in
18 this case. Therefore, this evidence should be excluded under Rule 401.

19 Even if the Court were to believe that there was some relevance to this evidence,
20 the relevancy of these determinations would be substantially outweighed by unfair
21 prejudice, confusing the jury, and misleading the jury. *United States v. Reed*, 641 F.3d
22 992, 993 (8th Cir. 2011) (“Several circuits have unanimously upheld the exclusion of
23 evidence of prior charging decisions on the ground that many factors unrelated to guilt
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1 may influence those decisions and their admission therefore risks misleading the jury
 2 and confusing the issues." (citations omitted)). In this instance, introduction of this
 3 evidence would be purely motivated to inflame the passions of the jury by asserting that
 4 the Government was wrong to select Qazi for prosecution when state court charges were
 5 already pending against him. However, the jury, like a judge, would not have the ability
 6 to fully evaluate all of the factors that go into these types of determinations – such as
 7 the strength of a particular case, the deterrence value or the prosecutions enforcement
 8 policies or resources. Thus, allowing a jury to review these types of prosecutorial
 9 decisions is no different than a judge intervening in these determinations. For the same
 10 reasons, this type of argument should not be permitted to be made to the jury. Thus,
 11 even if relevant, this evidence should be excluded at trial.^{3, 4}

12 **B. Issues Related To Pretrial Motion Practice and Discovery Matters**
 13 **Are Irrelevant**

14 It is believed that Qazi may attempt to "litigate the litigation" before the jury.
 15 Specifically, based on Qazi's previous filings and innuendos, the Government anticipates
 16 that Qazi will attempt to argue to the jury, or present evidence, that the Government
 17 has somehow engaged in some sort of improper conduct based upon pretrial litigation
 18 actions or alleged discovery violations. This would be highly improper.

19 As a starting point, pretrial litigation conduct and discovery related matters are

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 21 ³ Note that if Qazi chose to question or challenge the Government's exercise of its discretion to charge him
 22 federally, a proper rejoinder would involve the Government's consideration of Qazi's criminal history and
 23 propensity for violence in exercising its discretion. Qazi would do well to leave that door closed at trial.

24 ⁴ Should the content of the transcript of the preliminary hearing held for Qazi in Las Vegas Justice Court
 25 become admissible under the Federal Rules of Evidence, the Government obviously does not object to Qazi
 26 being able to use the transcript for legitimate purposes, such as impeaching a witness with a prior
 27 inconsistent statement made at the preliminary hearing.

1 not related to any of the elements of the crimes charged in the indictment nor are they
2 a proper basis for a “defense.” In fact some courts have expressly recognized that any
3 evidence or argument that relates specifically to pretrial litigation between the parties
4 would simply be an attempt to litigate the litigation before the jury, which is
5 impermissible. *See generally, Timberlake Const. Co. v. U.S. Fidelity & Guaranty Co.*, 71
6 F.3d 335, 340 (10th Cir. 1995) (once litigation is commenced, the actions taken in defense
7 of that litigation, are not probative of whether or not the underlying torts were
8 committed.) Strategies and tactics used by parties in pretrial litigation are not relevant
9 to prove any issue of consequence in a case. On this basis alone, these matters are not
10 relevant and should be deemed inadmissible. Fed. R. Evid. 402 (irrelevant evidence is
11 not admissible).

12 Additionally, permitting evidence related to pretrial conduct or alleged discovery
13 violations would also be improper pursuant to Federal Rule of Evidence 403. First,
14 allowing this type of evidence is unnecessary. If the Government did engage in any type
15 of “improper conduct” – including any alleged discovery violations, this would be a
16 question for the Court to decide – not the jury. This would raise issues of law – which
17 are the exclusive province of the Court. In this same vein, the Court can impose an entire
18 host of remedies against a party that violates its discovery violations – or even engages
19 in improper conduct. Fed. R. Crim. Pro. 16(d)(2). If the Court were to permit Qazi to
20 make these kinds of arguments to the jury, it would place the type of sanction to be
21 imposed – if any – on the jury. This would be highly prejudicial to the Government.

22 Moreover, allowing Qazi to provide evidence to the jury of the Government’s
23 decisions to engage in pretrial motion practice or the like would undermine and
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1 discourage attorneys from zealously advocating for their clients within the bounds set
2 by law. *See Timberlake*, 71 F.3d at 341. In order to rebut these types of assertions,
3 Government counsel would become a witness in the case. This would violate the
4 undersigned's Nevada ethical obligations. *See* Nev. R. Prof. Cond. 3.7. There would be
5 no other witness that could explain what actions were taken to provide discovery, what
6 pretrial motion practice was engaged in and why, or other strategic decisions or actions
7 taken by the Government during pretrial litigation. This would require that counsel
8 violate an ethical rule, and would be highly prejudicial to the Government.

9 Finally, allowing this type of evidence would be confusing to the jury, create an
10 undue delay, and, ultimately, would be a waste of time. Thus, for all of these reasons,
11 Qazi should be precluded from making any direct argument, offering evidence, or making
12 improper innuendos to the jury related to the pretrial proceedings between the parties,
13 including motion practice, discovery, continuances, self-representation, etc.

14 **III. Conclusion**

15 For the foregoing reasons, the Government respectfully requests that the
16 Court enter an order in limine precluding Qazi from the following:

17 1. Making any statement or argument to the jury related to pre-trial
18 litigation, discovery matters, or pre-trial orders to the jury in both this case and the
19 proceedings in Nevada state courts;

20 2. Introducing any evidence or attempting to illicit any testimony from any
21 witness related to pre-trial litigation, discovery matters, or pre-trial orders related to
22 either this case or the proceedings in the Nevada state courts;

3. Making any statement or argument to the jury related to matters of prosecutorial discretion, including but not limited to, the decision to charge Qazi, what charges to bring, and/or any reference to dismissal of charges in Nevada state courts; and,

4. Introducing any evidence or from attempting to illicit any testimony from any witness related to matters of prosecutorial discretion, including but not limited to, the decision to charge Defendant, what charges to bring, and/or any reference to the State of Nevada's decision to dismiss charges in state court.⁵

DATED this 5th day of July, 2018.

Respectfully submitted,

DAYLE ELIESON
United States Attorney

118

ALEXANDRA MICHAEL
PATRICK BURNS
Assistant United States Attorneys

⁵ The Government anticipates that Qazi will fail to abide by any such orders. Should he disregard such an order of the Court during trial, the Government will request that he be held in contempt and punished with a consecutive jail sentence for each violation.

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2 **CERTIFICATE OF SERVICE**
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4 I certify that I am an employee of the United States Attorney's Office. A copy of
5 the foregoing **GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE ANY**
6 **ARGUMENT OR EVIDENCE REGARDING (1) PROSECUTORIAL CHARGING**
7 **DECISIONS; OR (2) PRETRIAL LITIGATION** was sent to Defendant Qazi via
8 United States mail addressed to:

9 Mr. Omar Qazi #49760048
10 NSDC 2190 East Mesquite Avenue
11 Pahrump, Nevada, 89060

12 and on stand-by counsel Telia Williams, Esq., via electronic service by ECF, on July 5,
13 2018.

14 **DATED** this 5th day of July, 2018.

15 /s / Patrick Burns
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PATRICK BURNS
18 Assistant United States Attorney
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